Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 93-36
Nondominant Common Carriers	)	

MFS COMMUNICATIONS COMPANY, INC.
REPLY COMMENTS ON NOTICE OF PROPOSED RULEMAKING

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Dated: April 19, 1993

SUMMARY

MFS Communications Company, Inc. ("MFS") urges the Commission to appeal the decision of the United States Court of Appeals for the District of Columbia Circuit, that held unlawful the Commission's forbearance policy and/or to seek congressional codification of that policy. In the interim, however, MFS strongly supports the Commission's proposal to provide maximum streamlined tariffing requirements for nondominant domestic carriers. The proposed rules comply with the Communications Act, as interpretated in the Court of Appeals' Forbearance Decision, but minimize the burden of tariffing on nondominant carriers, as well as the Commission.

The Commission has broad authority under the Communications Act to modify the provisions of the Act and its own regulations so that it can best serve its regulatory function. Given that the market adequately disciplines nondominant carriers, and so ensures that they offer competitive prices and terms for their services, the Commission appropriately chose to focus its regulatory oversight on the dominant carriers, namely the LECs. As the Commission recognized, the LECs have market power that gives them both the ability and the incentive unfairly to discriminate among their captive customers or to cross-subsidize services that are subject to greater competitive pressures with profits from services provided on a monopoly basis. The Commission's proposed regulations are well within -- and a proper exercise of -- the Commission's authority.

The Commission moreover should summarily dismiss LEC arguments that they no longer dominate the market for access services and thus should be allowed,

along with the nondominant carrriers, to file their tariffs under maximum streamlined regulation. The LEC arguments are, first of all, procedurally improper since they are not responsive to the Commission's rulemaking. The Commission requests comments only on the tariffing requirements that should be applicable to nondominant carriers; it does not in the instant rulemaking query whether the long-standing classifications of carriers as dominant or nondominant still are appropriate. Second, the LEC arguments are factually incorrect. The LECs continue to have overwhelming control over access services and will continue to do so well into the future. Recent evidence shows, moreover, that the LECs currently abuse the pricing flexibility they have under the price caps, offering excessive term and volume discounts that lock up substantial segments of the market. The LEC requests thus merit summary dismissal.

MFS accordingly urges the Commission to adopt without modification its proposed rules and also to seek reinstatement of its forbearance policy through judicial review and/or congressional codification.

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MFS Communications Company, Inc. ("MFS"), whose nondominant carrier

detariff nondominant carriers. Prior to that decision, the Commission had employed a two-tiered system of regulation under which the dominant carriers, namely the LECs and AT&T, had to comply with detailed tariffing requirements and nondominant carriers either could file tariffs under a liberalized scheme or, if they preferred, file no tariffs at all (the "forbearance policy").[3/] As MFS demonstrated in its initial comments, differential treatment of dominant and nondominant carriers is amply justified. Dominant carriers -- by definition -- have a degree of market control that enables them to act anticompetitively by discriminating among customers or by cross-subsidizing their competitive services with revenues from those services that they monopolize. Nondominant carriers, on the other hand, have no such power. The market dictates the price and terms of nondominant carrier services, and if they attempt to deviate from the market price, their customers simply go elsewhere. Under these conditions, the Commission appropriately proposed stringently to regulate only those carriers that were not susceptible to market pressures -- the dominant carriers -- and to rely on market discipline to ensure the reasonableness of nondominant carrier rates. To have done otherwise would have been a waste of the Commission's scarce regulatory resources.

The nondominant carrier tariffing requirements proposed in the NPRM are consistent with the Communications Act, as interpreted in the Forbearance Decision. In the Forbearance Decision, the Court of Appeals did not question either the underlying policy rationale of the forbearance policy, or the Commission's authority to impose

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[3/] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59 (1982); id., Fourth Report and Order, 95 F.C.C.2d 554 (1983).

different tariffing requirements on dominant and nondominant carriers. Rather, the Court held that the express language of the Act requires all common carriers, dominant and nondominant, to file tariffs and that the Commission's discretion to "modify" the

contain either maximum rates or a range of rates; and (iii) may be filed on computer disk. The LECs, like most of the other commentors, generally concede that the Commission has authority to promulgate liberalized tariffing rules.[6/] This is unsurprising given the broad discretion delegated to the Commission by the Communications Act.

The Communications Act provides the broad outline of how a federal tariff should look It then delegates to the Commission the authority to promulgate regulations elaborating on those minimal tariffing requirements. The Act, for example, requires only that a carrier provide a "schedule showing all charges for itself and its concurring carriers . . . and showing the classifications, practices, and regulations affecting such charges" before it provides communications services under the Act.[7/] It does not dictate, however, what form that schedule should take, how the services provided should be described, or how the tariffs should be filed. Instead, the Commission has flexibility to craft the tariffing requirements as necessary for the proper regulation of the industry.

Section 203(a) thus provides that "[s]uch schedules shall contain such other information, and be printed in such form, as the Commission may by regulation require."[8/] In its historic role of regulating monopoly carriers, the Commission exercised this discretion to require fairly particularized tariffing requirements, mandating that carriers file specific rates for specific services and provide detailed cost justification for

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[6/] See, e.g., BellSouth at 8; Southwestern at 17.

[7/] 47 U.S.C. § 203(a).

[8/] Id.

those rates. Such rigorous requirements facilitate review of filings of the Commission and interested parties, and greatly aids the Commission in identifying unreasonable rates and practices.

Such stringent review is, however, unnecessary for nondominant carriers, and MFS accordingly urges the Commission to apply maximum streamlined regulation to them. The Act clearly allows the Commission this flexibility. Under Section 203(b)(2) of the Act, the Commission is authorized to modify portions of the Act, or its own implementing regulations, either in specific cases or by general order.[9/] Differential treatment of nondominant carriers is warranted by the market discipline on these carriers, which ensures that they offer competitive, nondiscriminatory prices. As described herein, each regulation proposed in the NPRM is encompassed by the Commission's modification authority and will serve the public interest.

The Commission first seeks a modification of the 120-day notice period set forth in the Act. There is ample precedent for such a proposal. The Commission already has reduced the 120-day notice period to 45 days for dominant carriers and to 14 days for nondominant carriers, reasoning that the notice period for nondominant carriers should be shorter since they alone are subject to market discipline. In its NPRM, the Commission, after reviewing the current notice periods, concluded that even a 14-day notice period inordinately burdens nondominant carriers and thus should be reduced further. Given the clear language of the Act and the long-standing precedent under it, it

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[9/] Id. § 203(b)(2).

is hardly surprising that most LECs have readily conceded the Commission's authority to allow a maximum streamlined notice period.[10/]

Several LECs object, however, to the Commission's proposal that nondominant carriers be allowed to list maximum-only rates or a minimum-maximum range of rates in their tariffs. They contend that the Communications Act dictates that all carriers specify the particular rates for all of their services, whether this level of detail serves any regulatory purpose or not.[11/] Fortunately, however, the Act does not mandate such a waste of resources. The establishment of a maximum rate or a range of rates complies with the express language of the Act, which requires that all carriers file a "schedule of charges." Here, all the Commission has done is to provide that nondominant carriers must satisfy the most basic dictates of the Act, and need not provide the additional detail that the Commission has required of dominant carriers. The Act nowhere requires either by express language or by implication the filing of specific rates for specific services. The Act's modification authority clearly supports the Commission's proposal.[12/]

[10/] But see NYNEX at 3. Sprint does not directly challenge the Commission's authority to adopt maximum streamlining, but contends that this proposal would be inimical to the public interest. Sprint at 3.

[11/] Significantly, both BellSouth and Southwestern concede that the Communications Act authorizes the Commission to allow a maximum rate or range of rates. See supra note 6.

[12/] Some of the LECs cite Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986), which was decided under the Interstate Commerce Act ("ICA"), for the proposition that the Commission has no authority so to modify the Act's requirements. However, as demonstrated supra, the Commission is not modifying the requirements of the Act: it still requires carriers to file a "schedule of charges," though it requires no more of them. Furthermore, even assuming, arguendo, that the

(continued...)

Not only is the Commission's authority to allow maximum streamlined regulation of nondominant carriers incontrovertible, the exercise of that authority would

resources defending its tariff. Since that time, NYNEX has also filed an opposition to the MFS tariff -- which is equally meritless.

If the Commission extends the notice period beyond one day, it can reasonably expect to see the continued escalation of such harassment. Indeed, LECs have great incentive to initiate as much nuisance litigation as possible against nondominant carrier tariffs. This derives from the fact that the LECs incorporate their legal costs into their rate base with guaranteed recovery from monopoly services. For CAPs and other nondominant carriers, however, such costs directly reduce profit margins. It therefore pays the LECs to oppose CAP tariffs, even though they have no

freedom of nondominant carriers from these tariffing requirements has, as the

Central to the LECs' desire for "regulatory parity" is the increased flexibility that liberalized regulation would give them to price their services with no Commission oversight. However, recent experience cautions that LECs still have both the ability and incentive unfairly to discriminate among their customers and to cross-subsidize competitive services with monopoly profits. There is thus a strong need for some pricing control that allows both the Commission and interested parties to review the rates charged by the LECs. MFS therefore strongly urges the Commission to reject the LEC requests.

A. The LEC Request is Procedurally Improper

The Commission's NPRM solicits comments on whether maximum streamlined tariffing requirements are appropriate for nondominant carriers but does not inquire whether the current classifications of dominant and nondominant carriers are

demonstrated in MFS' initial comments, by figures showing that the LECs still control over 99% of the telecommunications market. Such a dominant market posture will not be eroded for many years to come, and then only if the regulatory environment becomes increasing receptive to LEC competitors, ensuring that they indeed have equal access to customers.

The current evidence demonstrates that the LECs are prone to abuse the rather wide degree of pricing flexibility that they already have. MFS, for example, has demonstrated in an ex parte filing that the price cap rules do not restrict nor provide a mechanism for review of anticompetitive volume and term discount offerings.[14/] Under the price cap rules, the LECs have been able to offer discounts ranging up to 70% or more for long-term contracts that lock in their favored customers for as long as a decade. The magnitude of these discounts strongly suggests that the LECs are pricing services becoming subject to competition at below-cost levels, so much so that the Commission has launched an inquiry into LEC discounting practices. Moreover, with the implementation of geographic rate deaveraging through zone density pricing, the LECs will have even greater flexibility -- and thus even more opportunity for abuse.[15/] Under

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[14/] Ex Parte Submission of Metropolitan Fiber Systems Inc.: Local Exchange Carriers Are Increasingly Using Predatory Pricing Tactics, Including Steep Discounts for Hubbing Arrangements, Volume Purchases, and Term Commitments, to Foreclose Competitive Entry and Preserve Market Share in Anticipation of Expanded Interconnection for Interstate Special and Switched Access Services (filed in CC Docket No. 91-141 on May 27, 1992).

[15/] See MFS Petition to Hold Proceedings in Abeyance, CC Docket No. 91-141 (Mar. 23, 1993).

these circumstances, LEC contentions that they need additional pricing flexibility to compete with their CAP competitors should be rejected.

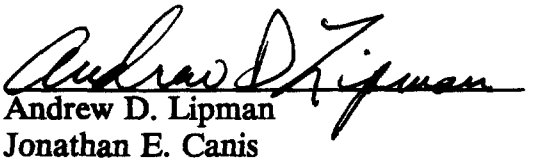
Some LECs contend that the advent of collocation for interstate special access services will bring the nondominant carriers on par with the LECs, and so justifies increased LEC pricing flexibility. However, as MFS has demonstrated, the LECs have filed collocation tariffs that propose to establish grossly excessive charges and unreasonable terms and conditions. The operative lesson is that LECs will make it as uneconomic as possible for their competitors to access the local network -- thereby retaining the bottleneck control over local access services that previously has prevented the development of effective competition for the majority of LEC customers. Clearly a long road lies ahead before CAPs and other nondominant carriers are able to make significant inroads on the LEC control of the marketplace. For this reason, MFS urges the Commission to sustain its classification of LECs as dominant carriers, which are subject to stringent tariffing requirements.

IV. CONCLUSION

The Commission should petition the United States Supreme Court for a writ of certiorari, asking it to reverse the Forbearance Decision. Alternatively, the Commission should seek congressional codification of its forbearance policy. In the interim, however, the Commission should adopt without modification the tariff filing

requirements proposed in its NPRM and should reject as procedurally improper, or as meritless, LEC requests for liberalized regulation.

Respectfully submitted,



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Dated: April 19, 1993

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 1993, copies of the foregoing MFS COMMUNICATIONS COMPANY, INC. REPLY COMMENTS ON NOTICE OF PROPOSED RULEMAKING were served via hand-delivery to the parties below:

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